No. 596

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER KORPAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Northern District of Illinois which had adjudged respondent guilty of having failed to pay the tax imposed on coin-operated "so-called 'slot' machines."

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 15–26) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 28, 1956 (App. A, *infra*, p. 27). On Octo-

ber 26, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton to and including November 27, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a pin-ball machine the operation of which involves the element of chance as the result of which the player may become entitled either to free plays or to money is the type of gaming device which is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461 (2) upon "so-called 'slot' machines" as defined in 26 U. S. C. (Supp. III) 4462 (a).

STATUTES AND REGULATIONS INVOLVED

The Internal Revenue Code of 1954, 26 U. S. C., Supp. III, provides in pertinent part:

> SEC. 4461. IMPOSITION OF TAX.
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);
>
> (2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *
>
> SEC. 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE.

(a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens,

(b) *Exclusion.*—The term "coin-operated amusement or gaming device" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine.*—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

Treasury Regulation 59, Section 323.22, as amended by T. D. 5203, 7 F. R. 10835, (26 C. F. R. (1949 ed.) 323.22 (b)), provides:

* * * * *

Examples of machines which, when operated by means of the insertion of a coin, token, or similar object, are regarded as gaming devices for purposes of these regulations are:

(a) A "pin-ball" machine with respect to which unused "free plays" are redeemed in

cash, tokens, or merchandise, or with respect to which prizes are offered to any person for the attainment of designated scores.

(b) A machine which, even though it does not dispense cash or tokens, has incorporated gaming features in the form of combinations of insignia on reels or drums.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged respondent with having wilfully failed to pay the special occupational tax imposed by 26 U. S. C. 4461 (2) *supra*, p. 2, upon coin operated "so-called 'slot' machines" as defined in 26 U. S. C. 4462 (a) (2), *supra*, p. 3, maintained on respondent's premises (R. 3). Respondent, having waived jury trial (R. 4), was convicted by the court and sentenced to pay a fine of $750 (R. 97).

The disputed issue was whether the machines in respondent's premises were coin-operated gaming devices as defined in 26 U. S. C., Supp. III, 4462 (a), *supra*, p. 3, on which the tax to be paid is $250 or whether they were amusement devices under 26 U. S. C., Supp. III, 4462 (a) (1), *supra*, p. 3, with which respondent had complied by paying the $10 tax (R. 11). The evidence showed that the machines were pin-ball machines activiated by insertion of a coin which entitled the player to five balls. Certain scores resulted in free replays which were registered by an electrical scoring mechanism on the scoreboard (R. 24, 45, 47, 57). The possibility of scoring more replays by raising the odds could be increased by depositing addi-

tional coins (R. 25, 48). Additional balls could also be secured by depositing additional coins after the first five balls had been expended, although an extra ball was not always obtained by deposit of the additional coin (R. 26, 27, 66). There were also "game features" affording additional methods of obtaining replays which were determined by an electrical current over which the player had no control except by depositing coins which might or might not produce the hoped for result (R. 59, 62, 68–69). The player had the choice of playing off the replays or receiving money for them (R. 19, 29). Certain players were proved to have received money at their request (R. 19–20, 29).

In adjudging the defendant guilty, the District Court necessarily found the machines were within the definition of Section 4462 (a) (2). The Court of Appeals reversed, holding that the machines were not within Section 4462 (a) (2) even though they might well be deemed gaming devices since, in the court's view, the legislative history indicated "that Congress intended to exclude pinball machines from the category of gaming devices" (App. A, *infra*, p. 23). The Court of Appeals regarded the Treasury Regulation under which the machines in question would be considered subject to the $250 tax as inconsistent with the statute (App. A, *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals, which adopts an interpretation of Section 4462 (a) at variance with that of the Treasury Department since 1942, has already had and will continue to have a serious

effect on the revenue and on the enforcement of federal gambling laws. It is estimated by the Treasury that revenue of approximately $3,500,000 per year is affected by the interpretation of the statute announced below. Approximately 100 criminal convictions and several hundred forfeitures have already been had under the Treasury's interpretation of the statute as covering pin-ball machines so operated as to involve the chance receipt of money or free games by the player. In addition, there are numerous cases, criminal and civil, now pending before District Courts in which the same issue is involved. In reliance on the decision below, the District Court for Minnesota, on November 6, 1956, in two consolidated cases, reversed a previous ruling refusing to dismiss indictments involving substantially similar machines and dismissed the indictments (which described the machines) on the ground that they failed to charge an offense under the statute. From that decision, a copy of which is set forth in Appendix B, *infra*, pp. 28–34, a direct appeal to this Court under 18 U. S. C. 3731 has been taken. Several similar indictments have also been dismissed by the District Court for Arizona and appeals will be noted in those cases as well. Since, therefore, the issue will be before the Court on those direct appeals, and the present decision is in effect incorporated into those appeals, it is respectfully suggested that this case should also be reviewed.

2. The opinion of the Seventh Circuit is largely based on its interpretation of the legislative history of the statute as showing that the definition of "so-called 'slot' machines" in Section 4462 (a) (2), *supra*, p. 3,

was not intended to include any form of pin-ball machine, even though the particular pin-ball machines are within the literal terms of the statute since their operation involves a substantial element of chance as the result of which the player may receive money. In so doing, the court has interpreted some equivocal words in various Congressional reports without considering the problem to which these reports relate. Consideration of the history which led up to the reports, as well as of the statute, demonstrates that Congress intended to draw a distinction, not between pin-ball machines *per se* and the slot machines known as "one arm bandits", but between machines with the primary function of amusement (a category which includes many pin-ball machines) and machines with the primary function of acting as a gaming device (including pin-ball machines operated as were the devices in this case). This legislative history also shows that all gaming devices were to be subject to the heavier $250 tax, whether they involved pin-balls or not.

(a). The proposal to tax coin-operated machines was first made as part of the Revenue Act of 1941, and as originally passed by the House of Representatives would merely have taxed all coin operated amusement or gaming devices at the same rate (see H. Rep. 1040, 77th Cong., 1st sess., p. 60). The machines, all to be subject to the same tax, were defined as:

> (1) so-called "pin-ball" and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

The Senate Committee proposed that a distinction be made between gaming devices and amusement devices, with a lower tax for *"so-called pinball or other amusement devices"* (emphasis added) (S. Rep. No. 673, 77th Cong., 1st sess., p. 21). Senator Clark of Missouri, who proposed the amendment (87 Cong. Rec. 7298), made it clear that the purpose was to distinguish between gambling machines and those pin ball machines which were played "without any hope of recompense, without any premium". 87 Cong. Rec. 7298. The following colloquy makes clear the intent to differentiate between machines on the basis of their use and not their name or method of operation (87 Cong. Rec. 7301):

Mr. CLARK of Missouri. The definition is perfectly plain. In lines 5 and 6 is this provision:

(1) $10 per year in the case of a device defined in clause (1) of subsection (b):

Subsection (b) reads in part:

Definition: As used in this part, the term "coin-operated amusement and gaming devices" means (1) so-called pin-ball and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object.

Referring now to line 17:

(2) so-called slot machines which operate by means of insertion of a coin, token, or similar

object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

Mr. President, clause 2 of subparagraph (b) certainly takes out from the operation of clause (1) any machine which returns any sort of a premium, and that was the intention of the amendment, and it was the intention of the committee in adopting it.

Mr. BARKLEY. Mr. President, let me ask the Senator a question.

Mr. CLARK of Missouri. I shall be glad to answer, if the Senator from Nevada will yield.

Mr. MCCARRAN. I yield.

Mr. BARKLEY. It refers to "a coin-operated amusement or gaming device," and under clause No. 1 it is still necessary to put in a coin in order to operate the machine.

Mr. CLARK of Missouri. There is no question about that.

Mr. BARKLEY. What does one get for the coin?

Mr. CLARK of Missouri. He does not get anything except the pleasure of playing the game.

Mr. BARKLEY. He has the pleasure of putting the coin in without the chance of getting anything back?

Mr. CLARK of Missouri. Yes.

Mr. BARKLEY. Under clause 2 there is a chance to get something back. That is the difference?

Mr. CLARK of Missouri. That is the difference between any sort of an ordinary amusement, for instance, riding on a chute-the-chute and playing the roulette wheel. The Senator has stated the difference just as well as it could be stated.

> Mr. BARKLEY. In the case of the roulette wheel, I do not think there is a chance of getting anything back.
>
> Mr. CLARK of Missouri. Nor do I, but very few people play the roulette wheel without the hope of getting something back. The Senator from Kentucky has precisely stated the difference between amusement and gambling, as well as it could possibly be stated by a corps of experts after months of testimony.

The conference report on the bill (H. Rep. 1203, 77th Cong., 1st sess., p. 18) describes the final bill as follows:

> *Amendment No. 147:* The House bill imposed an occupational tax of $25 per annum with respect to the operation of a pin-ball game, a slot machine, or similar amusement or gaming device. The [Senate] amendment establishes two different rates of tax: $10 per annum in the case of a pin-ball game, *or similar game or amusement machine*, and $50 with respect to so-called slot machines, *the operation of which involves an element of chance*; and the House recedes. [Emphasis added.]

(b). In the Spring of 1942, during the Hearings before the Committee on Ways and Means of the House of Representatives on Revenue Revision of 1942, 77th Cong., 2d sess., various complaints about the tax were voiced by representatives of the coin-operated machine industry. One of the complaints was that penny candy machines, which gave out additional prizes for certain combinations, were being taxed as gambling devices (Hearings, vol. 2, pp. 2278–2280; vol. 3, 2682–2688). Another complaint was that

the Treasury Department, since February 1942, was interpreting the classification of machines as amusement or gambling by usage, *i. e.*, by whether prizes were obtained thereby, rather than by the physical characteristics of the machines. The suggestion was offered that the tax should be determined by the physical characteristic of the machines (Hearings, vol. 2, pp. 2055–2061; see particularly pp. 2056–2057).

Similar complaints were voiced in the Hearings before the Committee on Finance, United States Senate, 77th Cong., 2d sess., on H. R. 7378, both as to penny vending machines (Vol. 1, pp. 1135–1141), and as to the classification according to usage rather than according to physical characteristics (Vol. 1, p. 1133, Vol. 2, pp. 2256–2259). One industry representative stated (Vol. 1, p. 1134): "The taxing provisions as they now stand attempt to make a distinction between games of chance and games of pure amusement, but make no distinction as to the degree of chance which in turn affects the ability of the machine to pay the tax imposed."

As finally passed, the 1942 Act dropped the classification of "so-called 'pinball' or other amusement devices" for the term "coin-operated amusement devices" so as to include various other games and music machines. It created an exemption for the penny vending machines, under certain limitations. See Section 4462 (c), *supra*, p. 3. But despite the complaints that the Treasury Department's interpretation of the "so-called 'slot' machine" definition was erroneously based on usage, no change in the law was made in this respect. 56 Stat. 978. It seems

reasonable to conclude that Congress was satisfied with the Treasury's reading.

(c). The Treasury's construction of the "so-called 'slot' machine" definition as dependent on whether premiums were returnable as a result of an element of chance was formally set forth in Regulations 59, Section 323.22, as amended by T. D. 5203, approved December 22, 1942, quoted *supra*, pp. 3–4. While, there have been some individual variations in rulings as to specific factual situations, as noted by respondent before the District Court (R. 89–91), this is the regulation which is still in effect.[1]

Congress was made aware of this interpretation during the hearings on the 1954 Internal Revenue Code. Representatives of the industry made essentially the argument adopted by the court below in this case, that no pin-ball machines should be deemed within the "slot machine" definition. Hearings before House Committee on Ways and Means, 83rd Cong., 1st sess., on General Revision of the Internal Revenue Code, Part 4, pp. 2505–2522; Hearings before the Senate Committee on Finance on H. R. 8300, 83rd Cong., 2d sess., Part 4, pp. 1874–1879. Amendments were proposed to have the higher rate apply only to the "one-arm bandit" type of machine (House Hearings, p. 2510, Senate Hearings, p. 1879).

Again, the statute was reenacted without change in the pertinent definition. 68A Stat. 531. Since the administrative interpretation had been clearly and specifically pointed out to the congressional commit-

[1] Under Section 7807 of the 1954 Code, previous regulations remain in force until new regulations are issued.

tees, this reenactment "bespeaks congressional approval." *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 53; *Helvering* v. *Winmill*, 305 U. S. 79, 83.

In the light of this course of history since 1941, the Court of Appeals was not warranted in interpreting the statutory definition as it did, or in failing to give proper weight to the Treasury's regulation.

3. The court below also found support for its ruling in the fact that the Slot Machine (Johnson) Act, 64 Stat. 1134 (1951), 15 U. S. C. 1171–1177, banning transportation of slot machines in interstate commerce, defines the machines to which it applies as follows:

> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *.

We do not concede that the machines in question would not fall within the ban of the Slot Machine Act. They have drums or reels with insignia thereon for

scoring replays which are sufficiently an essential part of the machine to come within the definition of that Act. But, in any event, we do not regard the terminology of that Act as controlling here, since the history and purposes of the two statutes are different. The objective of the Slot Machine Act is to place an outright ban on the machines from interstate commerce, except as to states which permit them. The aim of the instant statute is, in large part, to raise revenue, as well as to discourage gambling. Congress could well have decided not to use its drastic power to prohibit pin-ball machines of the kind used here while it nevertheless regarded them as entirely capable of paying the higher tax which it imposed on gambling (as distinguished from amusement) devices.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1956.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11669. September Term and Session, 1956

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WALTER KORPAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

September 28, 1956

Before DUFFY, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges*.

SWAIM, *Circuit Judge*. This case comes here on appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the defendant, Walter Korpan, guilty of having violated § 7203 of Title 26 U. S. C. A., and fining the defendant $750.00 plus costs.

The indictment charged and the trial court found that the defendant, on premises occupied by him, maintained and permitted the use of certain coin-operated gaming devices as defined in § 4462 (a) (2) of Title 26 U. S. C. A.; that the defendant thereby became obligated to pay the special occupation tax imposed by § 4461 (2) of Title 26 U. S. C. A.; and that the defendant willfully failed to pay such tax in violation of § 7203 of Title 26 U. S. C. A.

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The decisive issue is whether the coin-operated machines in question are amusement devices as defined in Section 4462 (a) (1) or gaming devices as defined in paragraph (a) (2) thereof. If the machines here in question were described by subsection (a) (1) they were subject to a tax of only $10.00 a year but if they were gaming devices as described in subsection (a) (2) the annual tax on each machine was $250.00. 26 U. S. C. A. § 4461.

The facts, briefly, are as follows: The defendant operates a vacation resort known as "Korpan's Landing" in Fox Lake, Illinois. On August 12, 1955, certain coin-operated devices (commonly known as "pinball machines") were located in the resort's main building, a combination restaurant and tavern. On June 22, 1955, the defendant filed a tax return for the fiscal year July 1, 1955 through June 30, 1956, covering five amusement coin-operated devices and paid the tax of $10.00 per device. During the month of August 1955 the defendant exhibited an amusement device tax stamp for the machines in question.

The three machines involved in this litigation are basically alike. The insertion of a coin (a dime) activates the game and brings the first of five balls in front of a ball plunger. The game is played on an inclined board containing a number of holes into which the balls may enter. By pulling the plunger back and releasing it the ball is put into play. The legs of these games are so constructed as to allow a certain "give" which permits the player to "nudge" the machine forward, backward or sideward. The playing surface contains numerous rubber ringed posts and the player may nudge the game and cause the ball to contact one of these posts thereby increasing or cushioning the rebound of the ball. Scores are credited to the player if he causes a ball to roll into the holes. The scoring

is registered on a vertical glass panel on the back of the board. Free replays are scored upon principles similar to bingo, i. e., the lighting of three, four or five lights in a row (horizontally, vertically or diagonally). The player to some extent may control the course the ball will travel on the playing surface. The ball plunger rests inside a ball guide plate which is calibrated with either six or seven scored lines to permit the player to gauge the intensity of his shots. This permits the player to attempt to shoot the ball to the right or left side of the playing field. As noted above, the player may nudge the game in an attempt to control the course of the ball once it enters the playing surface. Each machine is equipped with a "tilt" device (which may be adjusted), and if the game is nudged too strongly this device will cause the word "tilt" to appear on the scoring panel and make the machine inoperative until an additional coin is inserted. The possibility of scoring more replays (by raising the odds) is increased by depositing additional coins. Additional balls may also be secured by depositing additional coins when the original five balls have been expended. An extra ball is not always obtained by the deposit of an additional coin. The extra ball feature may either be disconnected or adjusted to increase or reduce the possibility of obtaining an extra ball. The machines also incorporate certain "game features" which afford additional methods of scoring replays. These "added attractions" are determined by an electrical system. The only control the player has over such features is by depositing additional coins which may or may not produce a given feature. The machines also house a device known as a "reflex unit." Although there was dispute as to its precise function, it appears that it more or less balances out the high winnings as against small winnings. That

is, the total replays will tend to be the same over a given period of time. The replays that are won are registered by an electrical scoring mechanism on the score board. The player has the choice of playing off the games won or of receiving money for them from the defendant. Each machine has a device called a replay meter housed behind a locked door next to the cash box inside the machine. When cash is paid for games won, the proprietor presses a cancellation button on the bottom of the machine which removes the games won from the scoreboard and registers them on the replay meter inside the machine. This serves as an accounting device which permits the collection man to determine the number of games paid for by the proprietor for the purpose of reimbursing him.

It is undisputed that on August 12, 1955, the defendant made cash payments to witness Annette L. Veit in the sum of $1.00 for ten replays and to witness John M. Shamion in the sum of $1.20 for twelve replays.

It is undisputed that on August 12, 1955, the demeaning of 26 U. S. C. A. § 4462 (a) (2) and the intent of Congress in the enactment thereof expressly exclude the machines in question from the definition of gaming devices as set forth in that paragraph and that these machines are coin-operated amusement devices as defined in paragraph (a) (1) thereof.

The relevant portion of Section 4462 is as follows:

> "§ 4462. Definition of coin-operated amusement or gaming device.
>
> "(a) In general.—As used in sections 4461 to 4463, inclusive, the term 'coin-operated amusement or gaming device' means—
>
> "(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

> "(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

Section 4462 (a) (2) lays down three requirements in defining a coin-operated gaming device: (1) it must be operated by means of the insertion of a coin or similar object; (2) the application of the element of chance must be involved by virtue of which, (3) the machine may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

It is the Government's contention that if a particular machine incorporates these three incidents it meets the definition of a coin-operated gaming device and consequently is subject to the gaming tax rate of $250.00 for each such machine. The difficulty with this argument is that it overlooks the introductory language of paragraph (a) (2), *i. e.*, "so-called 'slot' machine."

If the dictionary definition of "slot machine" were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device.

> "A machine the operation of which is started by dropping a coin in a slot." Webster's New International Unabridged Dictionary, 2d Ed. 1955.

When this definition is considered with the choice of language employed by Congress, *i. e.*, "so-called 'slot' machine which operates by means of the insertion of a coin, token or similar object * * *," it would appear that Congress intended a more restrictive meaning for the term "slot machine." Otherwise,

there appears no purpose for the use of the language "so-called 'slot' machine."

The term "so-called" is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word "slot" indicates that Congress did not intend the language "so-called 'slot' machine" to be as comprehensive as the dictionary definition of "slot machine." Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co.* v. *Hoffman,* 101 U. S. 112; *Adler* v. *Northern Hotel Co.,* 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be "so-called 'slot' machines."

Since the term "so-called 'slot' machine" is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

The defendant in urging this point suggests that the term "slot machine" as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a "one-armed bandit").

There is force to this conclusion when the language thus employed is used in light of the legislative history of Section 4462.

Before reviewing the legislative history of this statute it would be well to consider the argument ad-

anced by the Government that the statute is clear and unambiguous, and that consequently there is no necessity for looking behind the words of the statute in order to determine what the intent of Congress was. We do not believe, however, that these words are sufficient in and of themselves to determine the purpose of the legislation. In such an event "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 at pages 543–44.

Sections 4461 to 4463 of the Internal Revenue Code were proposed by the House of Representatives of the 77th Congress. They were part of the Revenue Revision of 1941. As passed by the House a tax of $25.00 was assessed on each "coin-operated amusement and gaming device." H. R. 5417, § 555. These devices were defined as:

> "(1) so-called '*pin-ball*' and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and
>
> "(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens." [Emphasis added.]

The report of the Ways and Means Committee also indicates an intent to exclude pinball machines from the category of slot machines. The report stated: "'Coin-operated amusement or gaming devices' are, briefly, machines which fall within the general classification colloquially referred to as 'pin-ball' machines and 'slot machines'." H. R. Rep. No. 1040, 77th

Cong. 1st Sess. P. 60 (1941). The proposed bill, as subsequently passed by the Senate, apparently accepted the exclusion of pinball machines from the definition of slot machines, and reduced the tax on the former to $10.00 per device and raised the tax on the latter to $50.00 per device. The report of the Senate Finance Committee explained its proposed amendment as follows:

> "The House bill places a special tax of $25 per year upon each coin-operated amusement or gaming device maintained for use on any premises.
>
> "Your Committee divides these devices into two categories. Upon *so-called pin-ball or other amusement devices* operated by the insertion of a coin or token, the tax is reduced to $10 per year. Upon so-called slot machines, however, the tax is placed at $200. per year." Sen. Rep. No. 673, 77th Cong. 1st Sess. P. 21 (1941). [Emphasis added.]

The House accepted the Senate amendments, See H. R. Rep. No. 1203, 77th Cong. 1st Sess. P. 18 (1941), and the bill as amended became law as Section 3267 of the Internal Revenue Code of 1939—Public Law 250, 77th Cong. 1st Sess.

Subsequent to the outbreak of war Section 3267 was amended. The original language of the House bill of 1941 was amended to read: "any amusement or music machine * * *." H. R. 7378, § 617. The purpose of the amendment was to enlarge the category of machines subject to taxation. It might be inferred that by dropping the term "pin-ball machine" from the definition of coin-operated amusement device Congress intended to treat such machines as gaming devices. However, in H. R. Rep. No. 2333, 77th Cong. 2d Sess. P. 180 (1942), it was stated:

> "This section amends section 3267 of the Code by defining the term 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included *in addition to pin-ball machines* a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games." [Emphasis added.]

See also Sen. Rep. No. 1631, 77th Cong. 2d Sess. P. 266 (1942), and Congressman Eberharter's statement made at hearings before the Committee on Ways and Means. Hearings, 83rd Cong., 1st Sess. P. 2517.

With the exception of increases in the rate of taxation and technical changes of form adopted in 1954, the provisions of Section 3267, as amended in 1942, remain unchanged as Sections 4461 to 4463 of the Internal Revenue Code.

Although the legislative history of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, "so-called 'slot' machine," it does indicate that Congress intended to exclude pinball machines from the category of gaming devices.

The Government, nevertheless, contends that these machines are coin-operated gaming devices which entitled winning players to receive cash. The Government cites state court decisions holding that machines similar to the ones here involved are gaming devices. See *People* v. *One Mechanical Device*, 9 Ill. App. 2d 38, 132 N. E. 2d 338; *State ex rel. Dussault* v. *Kilburn*, 111 Mont. 400, 109 P. 2d 1113. However, these cases are inapposite for they concern the construction of local legislation which employ terminology quite different from that in Section 4462. Cf. Ill.

Rev. Stats. Ch. 38, § 342 (1955). The Government also cites *Johnson* v. *Phinney*, 5 Cir., 218 F. 2d 303, for the proposition that a pinball machine is a game of chance. The issue there arose out of the applicability of the wagering tax and is clearly distinguishable. Further, the question here is not whether pinball machines are gaming devices or games of chance; that they are may well be conceded. The question is rather: are pinball machines embraced within the term "so-called 'slot' machines." Congress has clearly indicated that they are not.

Statutes which relate to the same thing or same class of things are often helpful in construing a particular statute. See *Great Northern Ry.* v. *United States*, 315 U. S. 262.

The Johnson Act, passed on January 2, 1951, prohibits the interstate shipment of gambling devices which it defines as follows:

> "(1) any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> "(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *." 15 U. S. C. A. § 1171.

If this definition were applied to the machines here involved it is clear that they are without its scope. A drum or reel with insignia thereon is not an essential

part of defendant's machines, nor are these machines designed and manufactured so that when operated they may deliver any money or property.

We have been referred to only two cases which have considered the question before us. *Tooley* v. *United States*, 134 F. Supp. 162; *United States* v. *One Bally Dude Ranch Coin-Operated Pin-Ball Machine* (Civil Action No. 1778, D. C. M. D. Tenn., Dec. 10, 1953). The *Tooley* case was an action for refund of a portion of special occupation tax paid for a certain coin-operated device known as the "Side-bottom Super Crane Machine." The court there did not consider the meaning of the term "so-called 'slot' machine," as used in the statute, but concluded that "the expression 'by application of the element of chance' as used in said section 3267 (b) (2) [predecessor to the statute here involved] merely requires that there be a substantial element of chance involved in the play of the machine, and does not require that the element of chance predominate over the element of skill."

The defendant has urged that since the play of a pinball machine involves a modicum of skill it is not a machine which "by application of the element of chance * * * may deliver, or entitle the person playing or operating the machine to receive cash * * *." In our view of the case we do not reach this question and voice no opinion thereon.

The *One Bally Dude Ranch* case, a forfeiture action, was on a motion for summary judgment. We have been informed that a hearing on the merits had been continued.

The Government concludes from two cases under the Johnson Act, 15 U. S. C. A. § 1171, that devices far removed from "so-called 'slot' machines," *i. e.*, certain "digger" machines, have been held subject to the gaming tax. *United States* v. *24 Digger Merchandising*

Machines, 8 Cir., 202 F. 2d 647, cert. denied 345 U. S. 998; *United States* v. *10 Digger Machines*, 109 F. Supp. 825. However, the Johnson Act contains a broader definition of "gambling device" than the definition which we must interpret in the instant case.

Only one last point need be considered. The Government insists that Treasury Department regulations include pinball machines as gaming devices where unused free plays are redeemed, and such regulations are entitled to the force and effect of law. T. D. 5203, 1942-2 Cum. Bul. 276, 26 C. F. R. 323.22. But it is elementary law that a Treasury regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect. The Government, nevertheless, urges that these regulations have been in effect throughout subsequent amendments of Section 4462 and that it must therefore be assumed that the regulations have received Congressional approval.

We cannot assume on the facts of this case that Congress considered T. D. 5203 as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed. See *Casey* v. *Sterling Cider Co.*, 1 Cir. 294 Fed. 426.

We conclude that the pinball machines here involved are not gaming devices as defined in 26 U. S. C. A. § 4462 (a) (2).

For the reasons set forth above, the judgment of the District Court is reversed.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, September 28, 1956

Before

Hon. F. RYAN DUFFY, Chief Judge
Hon. H. NATHAN SWAIM, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

No. 11669

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WALTER KORPAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

No. 7980 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES B. HUNT AND GOPHER SALES COMPANY, DEFENDANTS

No. 7988 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HAROLD A. OLLHOFF AND GOPHER SALES COMPANY, DEFENDANTS

MEMORANDUM ORDER

These two proceedings are before the Court on defendants' motion in each case to dismiss the indictments herein on the ground that they "do not state an offense."

Mr. Ray G. Mooman and *Mr. Harry E. Ryan*, Minneapolis, Minnesota, appeared as attorneys for defendants in support of said motions, and *Mr. George E. MacKinnon*, United States Attorney, St. Paul, Minnesota, appeared as attorney for plaintiff in opposition thereto.

The indictments are substantially the same for present purposes. They charge the defendants with maintaining and operating within a certain place and

premises occupied by them "a so-called 'slot' machine of the pinball type, which operated by means of insertion of a five (5) cent coin and which by application of the element of chance did entitle the person playing and operating the machine to receive cash, premiums and merchandise from the defendants, and said defendants did then and there and in the manner aforesaid engage in and carry on a trade and business subject to tax imposed by the Internal Revenue Code of 1954, Section 4461 (2) * * * and Section 4901 * * * all in violation of the Internal Revenue Code of 1954, Section 7203."

The applicable statutes are as follows (all references are to the Internal Revenue Code of 1954):

> § 4461. Imposition of tax
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);
>
> (2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.
>
> § 4462. Definition of coin-operated amusement or gaming device
>
> (a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—
>
> (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and
>
> (2) so-called "slot" machines which operate by means of insertion of a coin, token, or simi-

lar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

* * * * * *

§ 4463. ADMINISTRATIVE PROVISIONS

(a) *Trade or business.*—An operator of a place or premises who maintains for use or permits the use of any coin-operated device shall be considered, for purposes of chapter 40, to be engaged in a trade or business in respect of each such device.

* * * * * *

§ 4901. PAYMENT OF TAX

(a) *Condition precedent to carrying on certain business.*—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) *Computation.*—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) *Now paid.*—

(1) *Stamp.*—All special taxes imposed by law shall be paid by stamps denoting the tax.

* * * * * *

§ 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax * * * who wilfully fails to pay such estimated tax or tax, * * * at the time or times required by law or regula-

> tions, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

The gist of the issue in the instant cases is whether the "coin-operated gaming device" in question is an amusement device within the definition thereof in Section 4462 (a) (1), or a gaming device as defined in Section 462 (a) (2).

Considering a like motion made by defendants in eleven cases this Court, on February 29, 1956, refused to grant a dismissal, and in an accompanying memorandum, said:

> "It is sound law that interpretation of statutes levying taxes should not permit implication to prevail above and beyond the clear import of the language used. Doubts in that respect are to be construed most strongly in favor of the defendants.[1] * * * I am not convinced at this posture of the case that the indictments go beyond the clear import of the language used in the applicable statutes."

On that occasion the Act quoted hereinbefore had not been interpreted by any binding appellate decision. Hence the Court's "judicial abstention"[2] from a holding that might be considered an unwarranted extension of the Act. On September 28, 1956, the Seventh Circuit Court of Appeals rendered a decision in point.

Stare decisis in the District of Minnesota must give way to a well-considered decision of a neighboring Court of Appeals that has reached an opposite holding

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[1] *Gould* v. *Gould*, 245 U. S. 151, 153.

[2] *United States* v. *Five Gambling Devices*, 346 U. S. 441, 449.

[3] *United States* v. *Korpan*, 7 Cir. — F. 2d —.

in a similar case.[4] As so clearly pointed out by the Eighth Circuit Court of Appeals, "it is elementary" that not only must a strict construction be applied to a criminal statute, but it must also receive "a uniform construction". It is the manifest duty of a federal trial court to follow the decisions of such federal courts in other Circuits (if not clearly erroneous) who have met with and decided the point in question.[5]

The government, critical of the decision in the Korpan case, supra, contends that:

> "The basic error committed in the Court's decision is that it attempts to construe by resort to legislative history 'clear' words in a statute. Then after importing the so-called 'legislative history it fails to properly understand it or apply it."

This reasoning is neither impressive nor persuasive.

The government has not convinced me that the Korpan decision is demonstrably wrong. In that case the Court, with customary clarity, discussing similar questions to those here in issue, emphasizes that logic and law oppose the viewpoint of the government in the instant case, in these words:

> "Section 4462 (a) (2) lays down three requirements in defining a coin-operating gaming device: (1) it must be operated by means of the insertion of a coin or similar object; (2) the application of the element of chance must be involved by virtue of which, (3) the machine may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

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[4] *McDonald* v. *United States*, 8 Cir., 89 F. 2d 128, 134.

[5] *Martyn* v. *United States*, 8 Cir., 176 F. 2d 609, 610. The Court of Appeals for the Eighth Circuit has not passed on the problem presented by the instant case.

"It is the government's contention that if a particular machine incorporates these three incidents it meets the definition of a coin-operated gaming device and consequently is subject to the gaming tax rate of $250.00 for each such machine. The difficulty with this argument is that it overlooks the introductory language of paragraph (a) (2), i. e., 'so-called "slot" machine'.

"If the dictionary definition of 'slot machine' were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device, 'A machine the operation of which is started by dropping a coin in a slot.' Webster's New International Unabridged Dictionary, 2d Ed. 1955.

"When the definition is considered with the choice of language employed by Congress, i. e., 'so-called "slot" machine' which operates by means of the insertion of a coin, token, or similar object * * *, it would appear that Congress intended a more restrictive meaning for the term 'slot machine'. Otherwise, there appears no purpose for the use of the language 'so-called "slot" machine'.

"The term 'so-called' is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word 'slot' indicates that Congress did not intend the language 'so-called "slot" machine' to be as comprehensive as the dictionary definition of 'slot machine'. Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112; *Adler* v. *Northern Hotel Co.*, 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be 'so-called "slot" machines'.

"Since the term 'so-called "slot" machine' is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

* * * * *

"Although the legislative history of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, 'so-called "slot" machine', it does indicate that Congress intended to exclude pinball machines from the category of gaming devices."

* * * * *

To extend the term "slot machine" to the devices described in the indictments would be a perversion of the language used by Congress. When a rule of conduct is laid down in words that evoke in the average mind the definition set forth in Section 4462 (a) (2), supra, it requires a straining of the imagination beyond a reasonable point to include therein the pinball machines here involved.[*]

The language adopted by Congress in said Section 4462 (a) (2) as interpreted by the Court of Appeals for the Seventh Circuit, points out an intent to expressly exclude the machines here in question from the definition of gaming devices, as set forth therein.

For the reasons above set forth, defendants' motions to dismiss must be granted.

IT IS SO ORDERED.

An exception is allowed to plaintiff in each case.

Dated this 6th day of November, 1956.

DENNIS F. DONOVAN,
United States District Judge.

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[*] *McBoyle* v. *United States*, 283 U. S. 25, 27.